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**IN THE SUPREME COURT OF FLORIDA**

JOSEPH S. CHIRILLO, JR., MD.
JOSEPH S. CHIRILLO, M.D., P.A., and MILLENNIUM PHYSICIAN GROUP, LLC,

Case No.: SC14-898
DCA Case No.: 2D12-5244

Petitioners,

v.

ROBERT GRANICZ, as Personal Representative of the Estate of JACQUELINE GRANICZ, Deceased,

Respondent.

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**PETITIONERS' REPLY BRIEF ON MERITS**

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*On Review from the District Court of Appeal, Second District Case No. 2D12-5244*

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## ARGUMENT

### I. OUTPATIENT SUICIDE AS THE HARM CANNOT BE REMOVED FROM THE EQUATION: THERE IS CONFLICT IN FLORIDA LAW, WHICH PROPERLY RECOGNIZES THAT PATIENT SUICIDE CANNOT BE ISOLATED FROM A DUTY TO TREAT

Rather than admitting there is conflict in Florida law and taking the straightforward approach of requesting this Court to approve *Granicz* and *Sweet v. Sheehan*, 932 So. 2d 365 (Fla. 2d DCA 2006), Mr. Granicz remarkably asserts that there is no conflict in Florida law—and thus, that the "universe of Florida cases" (Ans. Br., at 20) supports the Second District's decision. Since Mr. Granicz persists in the belief that there is no conflict (despite the Second District's certification of one and this Court's acceptance of discretionary jurisdiction), he necessarily proceeds to argue that the Florida cases holding that liability may not be imposed for outpatient suicide can be reconciled with *Granicz* and *Sweet* simply because they did not address a duty to treat an outpatient. This notion is meritless. Contrary to Mr. Granicz's suggestion, neat factual reconciliation of each of the applicable cases is not possible—because most of the cases simply recognize that liability cannot be imposed on a physician for the suicide of an outpatient absent a special relationship, namely, custody. The Second District's thinking is espoused

in *Granicz* and *Sweet*,[1] on one end of the spectrum, while the rule requiring custodial supervision, which controlled the outcomes in *Lawlor v. Orlando*, 795 So. 2d 147 (Fla. 1st DCA 2001), *Garcia v. Lifemark Hosps. of Fla.*, 754 So. 2d 48 (Fla. 3d DCA 1999); *Paddock v. Chacko*, 522 So. 2d 410 (Fla. 5th DCA 1988), *Tuten v. Fariborzian*, 84 So. 3d 1063 (Fla. 1st DCA 2012), and other cases cited in Petitioner's Brief on the Merits exists on the other. As long as an outpatient has committed suicide and thereafter sued her physician for malpractice, Florida law, excepting the Second District's approach in *Granicz* and *Sweet*, does not allow for the painstaking and ultimately misguided exercise in nuance that Mr. Granicz suggests courts and lawyers must undertake. Where liability is sought to be imposed on a physician for patient suicide, the question is simple: Whether or not the patient was under the physician's physical custody or control. If the patient was not, then allowing the physician to be held liable goes too far.

Mr. Granicz's attempt to reconcile *Lawlor*, *Garcia*, and *Paddock* with *Granicz* and *Sweet* on the basis that those cases did not involve an alleged "duty to

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[1] Mr. Granicz suggests that Petitioners have ignored *Perez v. United States*, 883 F. Supp. 2d 1257 (S.D. Fla. 2012). Petitioners are aware of *Perez* and agree that it falls under the umbrella of the Second District's approach in the decision below, *Sweet* and *Estate of Rotell v. Kuehnle*, 38 So. 3d 783 (Fla. 2d DCA 2010). Petitioners did not address *Perez* in the Initial Brief on Merits because it is a federal trial court decision, and thus, do not believe its analysis merits serious consideration as part of the applicable body of Florida law. As a federal case, it is also outside this Court's purview to quash or approve.

treat" also fails factually. In *Lawlor*, the plaintiff's precise allegations are not stated in the majority opinion beyond the statement that the plaintiff argued that the psychotherapist "owed a duty to the decedent . . . at the time of [his] suicide." *Lawlor*, 795 So. 2d at 148. Rather, the First District's holding followed its observation that "no Florida cases extend the duty of custodial supervision and care to the outpatient relationship between a psychotherapist and a patient." *Id.* at 147.

In *Garcia*,[2] the patient went to the emergency room first, after overdosing on medications, and second, after being involved in a car accident. 754 So. 2d at 48-49. When released, the patient committed suicide. *Id.* at 49. The plaintiff alleged numerous "duties to treat" on the part of the hospital and emergency room treating physicians, not simply a duty to prevent suicide: "The amended complaint further alleges that hospital personnel failed to note Mr. Garcia's visit of two days earlier; failed to take a proper history; failed to request a psychiatric consult; and failed to speak with Mr. Garcia's family." *Id.* Nevertheless, the Third District expressly disagreed with the plaintiff's contention that "the doctors still had a duty to properly diagnose and *treat* all of his ailments, including his suicidal tendencies."

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[2] Mr. Granicz states that the *Garcia* court disposed of an "embedded misfeasance claim[]" on the facts. (Ans. Br., at 31). Mr. Granicz's meaning is, at best, unclear since *Garcia* was disposed of by way of the defendants' motion to dismiss.

*Id.* (emphasis added). Although the Third District then discussed the pitfalls in requiring emergency room physicians to bear responsibility to treat patients for all psychiatric ills, this does not negate the court's reliance on the rule requiring confinement and the downsides of requiring "clairvoyance" with respect to "the internal workings of the human mind." *Id.* (citation omitted).

Nor has Mr. Granicz meaningfully distinguished *Paddock*.[3] In *Paddock*, "[t]he major thrust of the plaintiff's case centered around the failure of the defendant to hospitalize her and thus keep her from harming herself once her condition was known to him." 522 So. 2d at 411. The Fifth District held that the defendant had no such duty—and to get there, relied on legal authorities recognizing the absence of a duty in the instance of a suicidal outpatient: "[I]n each of these cases, the patients were already committed to the custody of a hospital or mental institution. . . . [T]hese custodians were in a position to exercise measures to prevent the suicidal patients from inflicting injuries upon themselves. In this case . . . Chacko was not in a position to do anything . . . ." *Id.* 415. Moreover, *Paddock* involved another allegation beyond the "major thrust" that the psychotherapist should have hospitalized the plaintiff: As here, that the defendant was negligent in failing to arrange a face-to-face interview with the plaintiff.

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[3] Mr. Granicz inadvertently references a dissent in *Paddock* (Ans. Br., at 20) but no judge dissented in that case.


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Petitioners accurately predicted that Mr. Granicz would seek to distinguish *Paddock* on the basis that he did not allege that Petitioners had a duty to involuntarily hospitalize Mrs. Granicz. (Ans. Br., at 16-18). But the presence and treatment of the "failure to arrange a face-to-face interview" allegation in *Paddock* demonstrates the fineness of the thread on which the argument rests. Mr. Granicz's contention that "this is not a duty to hospitalize case" is a farcical oversimplification because whether a case becomes a failure to hospitalize case (impermissible) or a failure to arrange for an in-office examination case (argued by Mr. Granicz to be permissible) depends entirely on what may or may not occur during the examination, and which, in either event, does not detract from the possibility that the outpatient will harm herself once outside of the office, or even before the appointment, in turn supporting the logic of the rule requiring confinement. The failure of Mr. Granicz's argument that "this is not a duty to hospitalize case" is demonstrated by the very passage *Paddock* itself quoted by Mr. Granicz (Ans. Br., at 17):

> The experts also testified that Chacko was negligent for failing to arrange for a face-to-face examination of his patient. However, the testimony as to whether this breach of duty caused the plaintiff's injuries is purely speculative. One expert testified that if Chacko had seen the plaintiff, he would have been "confronted with reality and the extent of her psychosis" and would have taken appropriate protective measures. On cross-examination however, when asked to elaborate on this point, the experts stated that "[a] lot depends on what conclusions


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> he would have come to under these circumstances when viewed in the context of other information that could be available." No expert was able to testify just what protective measures could have been taken by Chacko if he had examined the plaintiff. It seems clear that if he had examined the plaintiff, he could have only recommended hospitalization, which he had already done on the telephone. In this case, we find as a matter of law that Chacko's failure to visit with the plaintiff was not a proximate cause of her self-inflicted injuries.

*Id.* at 417. The same is true here (with the inapplicable exception that Petitioners did not recommend hospitalization as nobody ever knew Mrs. Granicz was suicidal, unlike Mrs. Paddock). While Mr. Granicz appears to suggest that the "face-to-face" argument was rejected in *Paddock* for factual reasons, where, as here, it can never be known what the patient would have told the physician at the office, what otherwise may have occurred during the examination will *always* be speculative. Therein lies the flaws in Drs. Werner's and Yaffe's opinions: Nobody can say whether Mrs. Granicz would have expressed suicidal ideations at the office visit that Mr. Granicz has made the focus of his claim. (R. V2, 255-57). She never had before—to Petitioners' office staff on her phone call, to Dr. Chirillo, or to her husband or daughter. There is no indication here that Mrs. Granicz would have suddenly changed course and divulged suicidal tendencies (if any she had, at that point in time). And if Mrs. Granicz had done so, Petitioners could not be held liable for failing "to demand and insure" that Mrs. Granicz be hospitalized. *Tuten*, 84 So. 3d at 1067-68; *Paddock*, 522 So. 2d at 413-17.

Thus, it is not Petitioners who have sought to blur a distinction between misfeasance and nonfeasance. (Ans. Br., at 7). On the contrary, it is a matter of Florida courts having already recognized that, in the particular context of outpatient suicide, consideration of substance over form, i.e., that the litigation concerns an outpatient who has intentionally ended his or her own life, is paramount. Mr. Granicz's relies on a "dichotomy" between "the duty to treat and the duty to prevent suicide." (Ans. Br., at 8). But the harm that befell Mrs. Granicz and caused her death is her suicide. Ignoring the specific nature of this unique harm, and the rationales that Florida courts have used to limit physician liability for it, is to engage in an academic fantasy. Mr. Granicz's reference to "misfeasance" versus "nonfeasance" presupposes that plaintiff's lawyers are filing suit and simply alleging that "the defendant had a duty to prevent the plaintiff's suicide." Undoubtedly, and as shown by Florida law excepting *Granicz* and *Sweet*, that is not the case.

Interestingly, Mr. Granicz criticizes Petitioners for being "guided . . . by the ring of the quote." (Ans. Br., at 8). But the "quote," which has controlled the outcome in Florida cases addressing outpatient suicide excepting *Granicz* and *Sweet*, is the black-letter law in this state. The black-letter law has meaning and application. The black-letter law provides that "[g]enerally, a doctor is not liable

for the suicide of a patient" with the exception being custodial supervision and care. *Garcia*, 754 So. 2d at 49; *Lawlor*, 795 So. 2d at 147-48; *Tuten*, 84 So. 3d at 1068 ("Tuten was not in the custody of appellees . . . when he killed himself and injured his wife."). Contrary to Mr. Granicz's Brief, the "quote" cannot be sheared from the law through strained attempts at reconciliation that are not only wrong but also provide no meaningful guidance to courts and litigants about the legal rules applicable to physician liability for the exceptional harm of outpatient suicide.

*Lawlor*, *Paddock*, *Garcia*, *Kelley*, and *Tuten* recognizing the absence of a legal duty for the suicide of an outpatient in the absence of a "special relationship"—which in Florida means patient confinement—are the better-reasoned cases. This substantial body of Florida law already recognizes that patient causing her death by her own hand, absent a heightened level of control, should not be subject to the same legal rules as malpractice in, for example, allowing a known or apparent physical malady to linger without treatment or leaving a sponge in a patient after surgery. The policy reasons for confirming that this is the rule statewide are clear. Nor is this rule inconsistent with *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992), which did not address the "nonfeasance" that outpatient suicide necessarily implicates. Mr. Granicz's contention that there is no conflict in Florida law should not be well-taken. Petitioners request, respectfully,

that this Court quash *Granicz*[4] and *Sweet*, confirm that Florida law imposes no duty on a physician for the suicide of an outpatient, and remand with directions that the judgment of the trial court be reinstated.

### II. THE SECOND DISTRICT DEFERRED TO THE OPINIONS OF MR. GRANICZ'S EXPERTS: FLORIDA LAW REQUIRES AN INDEPENDENT FORESEEABILITY ANALYSIS IN THE CONTEXT OF OUTPATIENT SUICIDE THAT THE SECOND DISTRICT DID NOT UNDERTAKE

Foreseeability is relevant to the issue of duty—which is a minimal threshold legal requirement for opening the courthouse doors. *See Fla. Power & Light Co. v. Periera*, 705 So. 2d 1359, 1361 (Fla. 1998). In the context of imposing liability on a physician following an outpatient's suicide, the foreseeability that the decedent would commit suicide is critically relevant. Even if suicide falls under the umbrella of a "specific injury" under *McCain*, the fact that a duty is sought to be imposed for the unique, self-inflicted harm at issue supports the analysis used by the trial court and in *Lawlor.* The Second District erred by failing to examine the foreseeability of whether Mrs. Granicz would commit suicide and in deferring to the testimonies of Mr. Granicz's experts on this issue.

Attempted application of *McCain*'s terminology illustrates why the Second District's approach is insufficient here. Mr. Granicz's (and his experts') primary

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[4] *Granicz v. Chirillo*, 147 So. 3d 544 (Fla. 2d DCA 2014).

theory is that Petitioners created a "zone of risk" by failing to immediately order Mrs. Granicz to come to his office following her phone call (which on its face did not indicate that Mrs. Granicz was suicidal). However, the notion of a "zone of risk" does not exist in a vacuum: An act or omission must create a "zone of risk" of something. Presumably, Mr. Granicz contends that not making an immediate appointment for Mrs. Granicz created a "zone of risk" of harm to Mrs. Granicz. But Mrs. Granicz committed suicide in her garage with no warning to anybody and Mr. Granicz cannot prove what Mrs. Granicz would have disclosed, if anything. So no risk of harm to Mrs. Granicz was created: one is only created if Petitioners had knowledge of any suicidal ideations. Indeed, Mrs. Granicz came to Petitioners' office to pick up the Lexapro samples but did not ask to see Dr. Chirillo and no member of his staff observed any troubling behavior on her part. Thus, this case presents a prime example of why specific knowledge of an individual's suicidal tendencies is required before the law will impose an affirmative legal duty to take action. *See* Restatement (Third) of Torts, § 37 cmt. f (2012).[5]

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[5] Again assuming *arguendo* that suicide, despite its self-inflicted nature, is a "specific injury" within the meaning of *McCain*, Petitioners fail to see how Mr. Granicz's reference to the Restatement (Third) of Torts § 37 cmt. f (2012) supports his position here: "Many courts use similar techniques [i.e., referencing quantity, quality, and similarity of prior episodes] to limit liability for failing to protect a plaintiff from self-inflicted harms." That is what this case is about because Mrs. Granicz committed suicide in her garage without providing notice to anybody. In

In *McCain*, a straightforward negligence action about mistaken markings where a mechanical trencher was used, a "zone of risk of harm to others" is easily imaginable. By contrast, examination of the "specific injury" of suicide as Florida courts have done in similar cases does not flout *McCain* because suicide cases indeed implicate an affirmative duty to prevent harm from occurring to the plaintiff. The "zone of risk" at issue here and the "zone of risk" created by the negligent marking of an area where a mechanical trencher will be used are scarcely comparable: Petitioners can only have created a "zone of risk of harm" to Mrs. Granicz if Petitioners knew she might or would consider ending her own life.

As a factual matter, and even straightforwardly applying *McCain* to these facts (which would be incorrect), Mr. Granicz's erroneously suggests that Mrs. Granicz's suicide was within a foreseeable zone of risk simply because Dr. Chirillo was treating her for "depression." (Ans. Br., at 32). Conservatively, thousands of individuals in the United States are being treated for depression by primary care physicians but are not suicidal. The fact that a physician is treating a patient for depression and that the patient has stopped taking her commonly-used

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fact, this Restatement comment perfectly supports the analysis employed in *Lawlor*, *Rafferman*, and *Kelley*, and explains why application of the *McCain* formulation, to the present context, while wearing blinders, is not appropriate. Mr. Granicz's reliance on the point that this case involves a "duty to treat" continues to miss the mark.

antidepressant is not evidence of a suicidal tendency generally, nor under the facts of this case. *See Lawlor*, 795 So. 2d at 148 (noting that evidence of depression does not, alone, create a foreseeable zone of risk of suicide).

Nor is *Dorsey v. Reider*, 139 So. 3d 860 (Fla. 2014), controlling here. In *Dorsey*, this Court held that the defendant's conduct in blocking an escape route of the plaintiff between two cars, who was hit from behind with the defendant's tomahawk by the defendant's friend, created a "zone of risk" within the meaning of *McCain*, that in turn, extended to the misconduct of the friend. *Id.* at 864-66. The totality of the circumstances, including the defendant's provision of access to his truck (where the tomahawk was) and ability retake control over the tomahawk, met "the exception to the general rule that a duty of care does not extend to misconduct of third parties." *Id.* at 866. *Dorsey* in no way "undercuts" the ability of courts to look to the foreseeability of a suicide in determining the existence of a physician's duty to an outpatient. (Ans. Br., at 35 n.10). Unlike the plaintiff in *Dorsey*, Mrs. Granicz inflicted injury on herself without notifying anyone, including Dr. Chirillo. This circumstance is governed by a different set of rules.

Finally, Mr. Granicz seeks to distinguish *Lawlor* on the basis that *Lawlor* "delved into the specific foreseeability" of the patient's suicide only in the context that the defendant had not seen the patient in three months. (Ans. Br., at 35). This

is not so, as the *Lawlor* court, like the trial court here, examined "all the supporting materials" and "factual allegations" to determine whether, and to whom and when, the plaintiff had expressed suicidal ideations:

> [W]e see nothing other than the opinion of plaintiff's expert to indicate that the suicide of Dr. Orlando's patient might have been foreseeable. The testimony of Dr. Wood's ex-wife and others who knew him during the time he was being treated by Dr. Orlando was that Dr. Wood showed no indication of suicidal tendencies; there is no evidence of suicide attempts, threats of suicide, nor any mention of suicide, and a suicide screening done in connection with Dr. Wood's brief incarceration only a few months prior to his suicide revealed no risk of suicide. There is evidence that Dr. Wood suffered from depression and met other risk factors, but that evidence does not necessarily create a foreseeable zone of risk of suicide for imposing a legal duty on Dr. Wood's psychotherapist.

795 So. 2d at 148. Thus, the foreseeability of an outpatient's suicide, which is primarily gauged by expressions of suicidal tendencies, is not only permissible, but a central, necessary consideration as it relates to the issue of duty. *Kelley v. Beverly Hills Club Apartments,* 68 So. 3d at 958; *Rafferman v. Carnival Cruise Lines, Inc.*, 659 So. 2d at1273; *Tuten*, 84 So. 3d at 1068; *Boynton v. Burglass*, 590 So. 2d at 449-50. These cases are not "looking at a different duty" (Ans. Br., at 35), they are applying a well-established proposition of law, as did the trial court, which recognizes that damages are being sought following a self-inflicted injury of suicide and thus that the foreseeability of the suicide must be considered as part of


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the required threshold legal inquiry. *See Guice v. Enfinger*, 389 So. 2d 270 (Fla. 1st DCA 1980); *Rafferman*, 659 So. 2d at 1273.

Therefore, Petitioners request that this Court adopt the trial court's analysis and find that Mrs. Granicz's suicide was not foreseeable to Petitioners as a matter of law, and thus, that Petitioners did not owe Mrs. Granicz a legal duty. Alternatively, Petitioners request this Court to remand to the Second District for the Second District to examine the foreseeability of Mrs. Granicz's suicide as it related to Petitioners' legal duty.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court quash the decision of the Second District below in *Granicz*, approve *Lawlor*, and remand for entry of judgment in favor of Petitioners because either 1) Petitioners owed no duty to Mrs. Granicz as she was not in Petitioners' custody, 2) because Mrs. Granicz's suicide was not foreseeable to Petitioners, or 3) a combination of these facts. Alternatively, Petitioners request this Court to remand to the Second District for the Second District to employ an independent foreseeability analysis of Mrs. Granicz's suicide as did the trial court.

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via electronic mail on this 8th day of April, 2015, to: **James B. Tilghman, Jr.,** (emailservice@stfblaw.com) Stewart, Tilghman, Fox, Bianchi & Cain, P.A., One S.E. Third Avenue, Suite 3000, Miami, Florida 33131.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 9.210(a), Fla. R. App. P., undersigned counsel hereby certifies that this brief is submitted in Times New Roman 14-point font.

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